In the Supreme Judicial Court of Massachusetts, December, 1859.

INTERROGATORIES PROPOUNDED BY ORDER OF THE GOVERNOR AND COUNCIL TO THE SUPREME JUDICIAL COURT.[1]

QUESTIONS:

1. Whether the legislature of this Commonwealth can constitutionally provide for the enrolment in the militia, of any persons other than those enumerated in the Act of Congress approved May 8, 1792, entitled, "An Act more effectually to provide for the national defence, by establishing an uniform militia throughout the United States?"
2. Whether the aforesaid Act of Congress, as to all matters therein provided for, and except as amended by subsequent Acts, has such force in this Commonwealth, independently of, or notwithstanding any State legislation, that all officers under the State government, civil and military, are bound by its provisions?

ANSWERS.—The undersigned, justices of the Supreme Judicial Court, having considered the above stated interrogatories propounded to them by the governor and council, do hereby, in answer thereto, respectfully submit the following opinion:—

We are first, as preliminary to any direct answer to the inquiries, to consider what the militia was, as understood in the constitution and laws, both of this Commonwealth and of the United States. It was an institution, not only theoretically known but practically adopted and carried into effect in all the colonies and provinces before the revolution, and even before the formation of a Congress for any purpose. The utility and capabilities of this institution for military purposes had been put to a severe test by the events of the revolution, and were well understood before either of these constitutions was adopted.

Prior to the revolution, the establishment and control of this institution was within the jurisdiction of the respective colonial and provincial governments, because these were the only local governments, acting directly upon the rights and interests of the inhabitants within their respective territorial limits. It was constituted by designating, setting apart and putting in military array, under suitable military officers, all the able bodied male inhabitants of the province,

[1] We are indebted to the courtesy of the learned Chief Justice of Massachusetts for this interesting paper. It was concurred in by the whole Court.—*Eds. Am. L. Reg.*

with certain specified exceptions, and was held in readiness upon certain exigencies, and in the manner provided by law, to act under military orders as a military armed force. It was the constituting of a citizen soldiery, in contradistinction to a regular standing army. Such having been the jurisdiction of the several provincial governments, it naturally devolved upon the respective State governments, after the declaration of independence, and during the earlier years of the revolutionary war. During that period, all were acting under the articles of confederation, which was rather a league between the States for mutual defence, than a government acting directly upon the people of those States.

The constitution of Massachusetts was adopted and went into operation in 1780. It recognized the militia as an essential department of the constitution of its government, and provided for the enrolment of the men, the appointment of the officers, their duties and powers, with all the details to give efficiency to this cherished arm of defence, and declaring its proper subordination to the civil power. It also, in the declaration of rights, distinctly declared the right of the people to bear arms. But this constitution, recognizing the existence of the articles of confederation between the States, and the powers thereby vested in the Congress of the United States, and possibly anticipating important changes therein, reserved from the State governments all powers then vested, or which might afterwards be constitutionally vested in Congress.

Several years afterwards, in 1789, the constitution of the United States having been adopted by the required number of States, including Massachusetts, went into operation, and became the law of the land. This system was founded upon an entirely different principle from that of the confederation. Instead of a league among sovereign States, it was a government formed by the people, and to the extent of the enumerated subjects, the jurisdiction of which was confided to and vested in the general government, acting directly upon the people. "We the people," are the authors and constituents; and "in order to form a more perfect union," was the declared purpose of the constitution of a general government.

It was a bold, wise, and successful attempt to place the people

under two distinct governments, each sovereign and independent, within its own sphere of action, and dividing the jurisdiction between them, not by territorial limits, and not by the relation of superior and subordinate, but classifying the subjects of government and designating those over which each has entire and independent jurisdiction. This object the constitution of the United States proposed to accomplish by a specific enumeration of those subjects of general concern, in which all have a general interest, and to the defence and protection of which the undivided force of all the States could be brought promptly and directly to bear.

Some of these were our relations with foreign powers—war and peace—treaties, foreign commerce and commerce amongst the several States, with others specifically enumerated; leaving to the several States their full jurisdiction over rights of persons and property, and, in fact, over all other subjects of legislation, not thus vested in the general government. All powers of government, therefore, legislative, executive and judicial, necessary to the full and entire administration of government over these enumerated subjects, and all powers necessarily incident thereto, are vested in the general government; and all other powers, expressly as well as by implication, are reserved to the States.

This brief and comprehensive view of the nature and character of the government of the United States, we think is not inappropriate to this discussion, because it follows as a necessary consequence that, so far as the government of the United States has jurisdiction over any subject, and acts thereon within the scope of its authority, it must necessarily be paramount, and must render nugatory all legislation by any State, which is repugnant to and inconsistent with it. There may, perhaps, in some few cases, be a concurrent jurisdiction, as in case of direct taxation of the same person and property; but until it shall practically extend to a case where there may be an actual interference, by seizing the same property at the same time, the exercise of the powers by the one is not, in its necessary effect, exclusive of the exercise of a like power by the other; but in such case, they are not repugnant. That one must be so paramount, to prevent constant collision, is obvious;

and, accordingly, the constitution expressly provides that the constitution and all laws and treaties, made in pursuance of its authority, shall be the supreme law of the land.

Assuming that such was the manifest object of the people of the United States, and of the several States, respectively, in establishing the two distinct governments in each State, we proceed to the more direct consideration of the questions propounded.

The establishment of a militia was manifestly intended to be effected by arranging the able bodied men in each and all the States in military array, arming and placing them under suitable officers, but without forming them into a regular standing army, to be ready as the exigency should require, to defend and protect the rights of all, whether placed under the administration of the local or general government, to be called out by either in the manner and for the purposes determined by the constitution and laws, or either. It was one and the same militia, for both purposes, under one uniform organization and discipline, and to be commanded by the same officers. Were it otherwise, were the general and the State governments to have their own militia, the results would have been, that there would be, within the bosom of each State, a large embodied military force, not by its organization amenable to the laws or subject to the orders of the State government; and also a similar force, on which the general government would have no right to call for aid to repel invasion, suppress insurrection, or execute the laws; a state of things, not only rendering each, to a great extent, inefficient and powerless, but also entirely destructive of that harmony and union which were intended to characterize the combined action of both governments. We find, therefore, that the functions of both are called into activity, in constituting this military force and carrying it into practical operation.

The constitution of the United States having charged the general government with the administration of the foreign relations of the whole Union, and the military defence of the whole, provides, (Article 1, section 8,) "That congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing,

arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress."

"Organizing" obviously includes the power of determining who shall compose the body known as the militia. The general principle is, that a militia shall consist of the able bodied male citizens. But this description is too vague and indefinite to be laid down as a practical rule; it requires a provision of positive law to ascertain the exact age which shall be deemed neither too young nor too old to come within the description. One body of legislators might think the suitable ages would be from 18 to 45, others from 16 to 30 or 40, others from 20 to 50. Here the power is given to the general government to fix the age precisely, and thereby to put an end to doubt and uncertainty; and the power to determine who shall compose the militia, when executed, equally determines who shall not be embraced in it, because all not selected are necessarily excluded.

The question upon the construction of this provision of the constitution is, whether this power to determine who shall compose the militia, is exclusive. And we are of opinion that it is. A power when vested in the general government is not only exclusive when it is so declared in terms, or when the State is prohibited from the exercise of the like power, but also when the exercise of the same power by the State is superseded and necessarily impracticable and impossible after its exercise by the general government. For instance, when the general government have exercised their power to establish a uniform system of bankruptcy, that is, laws for sequestering and administering the estate of a living insolvent debtor; when one set of commissioners and assignees of such estate have taken possession of property, with power to sell and dispose of it, and distribute the proceeds, another set of officers, under another law, cannot take and dispose of the same property. The one power is necessarily repugnant to the other; if one is paramount, the other is void. We think the present case is similar. The general

government having authority to determine who shall and who may not compose the militia, and having so determined, the State government has no legal authority to prescribe a different enrolment.

This power was early carried into execution by the Act of Congress of May, 1792, being an "Act more effectually to provide for the national defence, by establishing an uniform militia throughout the United States." This Act specially directs who shall be, and by necessary implication, who may not be enrolled in the militia. This is strengthened by a provision, that each State may by law exempt persons embraced in the class for enrolment, according as the peculiar form and particular organization of its separate government may require; but there is no such provision for adding to the class to be enrolled.

We are therefore of opinion that the legislature of this Commonwealth cannot constitutionally provide for the enrolment in the militia of any persons, other than those enumerated in the Act of Congress of May, 1792, hereinbefore cited.

We do not intend, by the foregoing opinion, to exclude the existence of a power in the State to provide by law for arming and equipping other bodies of men, for special service of keeping guard and making defence, under special exigencies, or otherwise, in any case not coming within the prohibition of that clause in the constitution, article 1, section 10, which withholds from the State the power "to keep troops;" but such bodies, however armed or organized, could not be deemed any part of "The Militia," as contemplated and understood in the constitution and laws of Massachusetts and of the United States, and, as we understand, in the question propounded for our consideration.

Nor is this question, in our opinion, affected by the article 2 of the amendments of the constitution, of the following tenor: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

This, like similar provisions in our own declaration of rights, declares a great general right, leaving it for other more specific con-

stitutional provision, or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights.

In answer to the second question proposed, we are of opinion that the Act of Congress above cited, as to all matters therein provided for, except so far as it may have been changed by subsequent Acts, has such force in this Commonwealth, independently of and notwithstanding any State legislation, that all officers under State government, civil and military, are bound by its provisions.

RECENT ENGLISH DECISIONS.

The Court of Exchequer.

CORNMAN *vs.* THE EASTERN COUNTIES RAILWAY COMPANY.

1. In an action against a railway company for negligence, in consequence of which the plaintiff has suffered injury, it is for the judge to decide whether there is any reasonable evidence of negligence proper to be left to the jury.
2. A railway company kept at their station a weighing machine on a platform close to the railway. On a particular occasion the plaintiff, being there to receive a parcel, was thrown against the weighing machine and injured:—Held, that whether there was evidence that the company were guilty of negligence in keeping the weighing machine where they did, was to be determined by the judge, on consideration of all the circumstances of the case.

The declaration alleged that the defendants were owners and proprietors of a railway for the carriage and conveyance of passengers and parcels for hire and reward, and were possessed of a railway station and platform abutting on it, upon, along, and over which all persons lawfully being at the station were used and accustomed and authorized by the defendants to pass and repass; that the plaintiff was expecting and about to receive a parcel then carried and conveyed by a certain train by the defendants at their request for reward, and to receive which parcel the defendants had authorized him to go and pass and repass upon, along, and over the plat-